

DOCKET FILE COPY ORIGINAL

USWEST

U S WEST, Inc.
Suite 700
1020 Nineteenth Street, NW
Washington, DC 20036
202 429-3123
FAX 202 293-0561

Kathleen Q. Abernathy
Vice President - Regulatory Affairs

EX PARTE OR LATE FILED

EX PARTE

June 3, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222, SC-1170
Washington, DC 20554

RECEIVED
JUN 3 - 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: CC Docket No. 98-26, Section 706 of the
Telecommunications Act of 1996

Dear Ms. Salas:

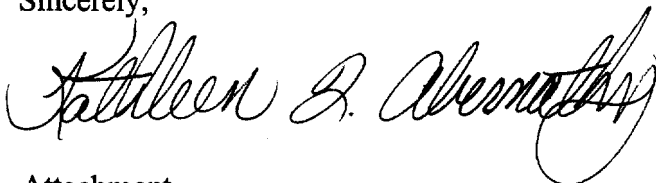
On June 2, 1998, Robert McKenna and the undersigned, representing U S WEST, met with Thomas Power, Legal Advisor for Chairman Kennard, to discuss the above-referenced proceeding. Attached is a copy of the material used during the discussion.

In accordance with Section 1.1206(a)(2) of the Commission's rules, an original and one copy of this letter and the attachment are being filed with your office for inclusion in the record of this proceeding.

Acknowledgment and date of receipt of this submission are requested. A duplicate of this transmittal letter is attached for this purpose.

Please call if you have any questions.

Sincerely,



Attachment

cc: Mr. Thomas Power

No. of Copies rec'd
List A B C D E

021

WILMER, CUTLER & PICKERING

2445 M STREET, N. W.
WASHINGTON, D. C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 663-6363

WASHINGTON
BALTIMORE
LONDON
BRUSSELS
BERLIN

June 2, 1998

MEMORANDUM

**Subject: Section 706 of the Telecommunications Act As a Source of FCC Authority To
Remove Regulatory Barriers to the Deployment of Advanced Services**

At your request, we have examined the text and legislative history of Section 706 of the Telecommunications Act of 1996, which directs the Federal Communications Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," and to do so by "utilizing . . . regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment." We have focused on whether this language is an independent grant of forbearance authority to the FCC, or, as some have suggested, merely an implicit cross-reference to another part of the Act — Section 10 — which directs the FCC to forbear from enforcing rules that competition has made unnecessary. By its express terms, Section 10 cannot be used to forbear from enforcing the unbundling, resale, and long-distance provisions of the Act until they have been fully implemented.

We conclude that Section 706 is a free-standing grant of authority and responsibility that neither refers to Section 10 nor is subject to its limitations. Section 706 both authorizes and requires the FCC to lift whatever regulatory barriers are discouraging carriers from investing in the communications infrastructure needed to bring the benefits of the Internet to smaller and rural communities. In adopting Section 706, Congress gave the FCC a broad set of tools to ensure that the marketplace does not divide the Nation into information "haves" and "have nots."

1. The plain language of Section 706 directs the FCC to lift all regulatory barriers, without limitation, that are hindering the deployment of advanced services to "all Americans." The language of Section 706 is broad and mandatory. Federal and state regulators "shall" encourage the roll-out of advanced technologies by using regulatory forbearance and removing barriers to investment. § 706(a) (emphasis added). And if the FCC finds, after inquiry, that "all Americans" are not receiving access to advanced services and technologies, "it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment." § 706(b) (emphasis added). There is nothing in the words of Section 706 that limits the barriers that the FCC must remove. Nor does the text contain any limit on the FCC's power to forbear from applying regulations that frustrate innovation, other than that the power be exercised in the public interest.

2. Congress intended Section 706 to be a robust, independent tool for ensuring that smaller and rural communities receive the benefits of advanced telecommunications. In passing the Act, Congress declared it a national priority that "[c]onsumers in all regions of the Nation, including . . . those in rural, insular, and high cost areas, . . . have access to telecommunications

and information services,” including advanced services, comparable to those available in urban areas. 47 U.S.C. §254(b)(3) (emphasis added). And Congress was plainly concerned that the marketplace might leave rural and smaller communities behind. See, e.g., 142 Cong. Rec. S. 709 (daily ed. Feb. 1, 1996) (statement of Sen. Daschle); 141 Cong. Rec. S. 7977 (daily ed. June 8, 1995) (statement of Sen. Snowe). It therefore passed Section 706 specifically to enable the FCC to take concrete actions to solve this problem. It did not intend the section to be a redundant reference to a different provision — Section 10 — that serves a different purpose.

- The Senate Report on the provision that ultimately became Section 706 states that “[t]he goal is to accelerate deployment of advanced capability that will enable subscribers in all parts of the United States to send and receive information . . . over a high-speed switched, interactive, broadband, transmission capability.” S. Rep. No. 23, 104th Cong., 1st Sess. at 50-51 (1995) (emphasis added).
- Sen. Conrad Burns, the author of Section 706, stated that it “will ensure that all Americans — in urban, suburban, rural, and remote areas — gain access to the most advanced telecommunications capability as quickly as market forces will allow.” 142 Cong. Rec. S. 700 (daily ed. Feb. 1, 1996).

3. The language of Section 706 is an independent grant of authority and contains no cross-reference to Section 10. The natural reading of Section 706 is that it stands on its own, and empowers the FCC to forbear from enforcing otherwise applicable requirements when doing so will further the deployment of advanced communications. Section 706 contains no express cross-reference to Section 10, nor does it have the limiting language that Congress wrote into Section 10. Moreover, it is highly unlikely that Section 706’s use of the term “regulatory forbearance” is an implied cross-reference to Section 10; the term has long had a general meaning apart from that section. For example, the FCC has used the term in a variety of contexts to refer to its authority to refrain from applying otherwise mandatory requirements of statutes or agency rules. See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, 8 FCC Rcd 7988, 7998 ¶ 51 (1993) (forbearance from tariff filing requirements); Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 390 ¶ 17 (1980) (forbearance from common carrier regulation of data processors); Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, 9 FCC Rcd 2164, 2165 ¶ 4 (1994) (forbearance for mobile service providers).

4. Interpreting Section 706’s grant of forbearance power as a cross-reference to Section 10 would eliminate Section 706 as a tool for achieving Congress’s infrastructure goals. By its terms, Section 10 focuses on whether competition has made regulation unnecessary; it leaves no room for the FCC to consider whether regulatory barriers are preventing carriers from bringing advanced services to “all Americans.” If Section 10’s mandatory criteria (which do not include infrastructure deployment) are not met for a given regulation, the FCC may not use Section 10 to forbear from enforcing that regulation, even if the regulation is clearly frustrating the widespread deployment of advanced services. Subordinating Section 706’s separate forbearance power to

Section 10 would essentially read it out of the Act, in violation of the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect."

United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992).

5. The forbearance U S WEST seeks is consistent with the other provisions of the Act.

Granting U S WEST's petition for regulatory relief would be consistent with Congress's intent, as expressed in the unbundling, resale, and long-distance sections of the Act.

- Relief from the Act's unbundling and resale rules for non-bottleneck data services comports with Congress's intent. U S WEST has stated that it will continue to comply with Section 251(c), making loops, collocation space, and finished voice services available to new entrants. U S WEST seeks only to confirm that data services and the facilities used to provide them (which are widely available from many sources) fall outside Section 251(c). We believe this is correct. By its plain language, Section 251(c) applies to incumbent LECs only in their capacity as local exchange carriers — that is, only to their provision of "telephone exchange service or exchange access." 47 U.S.C. § 153(26). Because packet-switched data communications do not travel on the circuit-switched telephone exchange network, they are neither telephone exchange service nor exchange access. Moreover, Congress recognized that not every element of the LECs' networks would be unbundled for new entrants; in Section 251(d)(2), it gave the FCC flexibility to determine which particular elements would be made available.
- Likewise, limited relief from the Act's interLATA restrictions for data services complies with Congress's intent. Congress gave the FCC express authority to modify LATA boundaries. 47 U.S.C. § 153(25)(B). As the FCC has recently recognized, this authority includes the power to waive LATA restrictions for data services, especially where doing so will enable a carrier to bring data services to customers who would otherwise be uneconomic to serve. See Southwestern Bell Tel. Co. Petition for Limited Modification of LATA Boundaries to Provide ISDN at Hearne, Texas, Mem. Op. and Order, FCC No. 98-923 ¶¶ 11, 13 (released May 18, 1998). Such limited waivers keep the Section 271 process for long-distance voice intact. We understand that U S WEST is continuing to comply with that process, and has made a firm commitment, if granted relief, not to market long-distance voice services over its data networks until it receives Section 271 authorization.

We hope this answers your questions. Please contact us if you would like to discuss this further.

Wilmer, Cutler & Pickering